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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,	**~~P~~P1300CR201001325**
Plaintiff,	
vs.	**RESPONSE re: STATE'S MOTION PURSUANT TO RULE 9.3**
STEVEN DEMOCKER,	
Defendant.	**(Hon. Warren Darrow)**

The Defendant, by and through undersigned counsel, hereby Responds to the state's "Motion Pursuant to Rule 9.3" (hereinafter "Rule 9.3 Motion"). The Defendant does not waive any of his Rights concerning Due Process of Law per the 5th and 6th Amendments of the U.S. Constitution, § 2, Articles 3, 4 and 24 of the Arizona Constitution, and the Arizona Rules of Criminal Procedure. The state's Motion appears to be a thinly-veiled attempt to prevent the DeMocker family members from talking to the Defendant and amongst themselves. The Defendant hereby OBJECTS to the "Rule of Exclusion" (hereinafter "The Rule") being invoked prematurely.

Rule 9.3., Arizona Rules of Criminal Procedure, "Exclusion of witnesses and spectators" states:

> a. Witnesses. The court may, and at the request of either party shall, exclude prospective witnesses from the courtroom ***during opening statements and the testimony of other witnesses***. The court shall also direct them not to communicate with each other until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person shall not be excluded from the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial. Notwithstanding the foregoing, the victim, as defined in Rule 39a, Rules of Criminal Procedure, shall have the right to be present at all proceedings at which the defendant has such right.

(16A A.R.S. Rules Crim.Proc., Rule 9.3, emphasis added).

As the Court can see from the plain language in the applicable first sentence in The Rule, "during opening statements and the testimony of other witnesses," The Rule is a *trial rule*, and since the trial has not started, any request to invoke it pre-trial is premature.

Rule 9.3, commonly called "The Rule," is almost always invoked after the jury is empaneled and before the opening arguments are about to start. Rule 9.3 is a good faith effort to prevent witnesses from discussing their testimony. However, The Rule is not always executed perfectly. Case law is full of litigation as to what the penalty is for violating The Rule.

> Rule 9.3 states that witnesses shall "not [ ] communicate with *each other* until all have testified." (Emphasis added.) If defendant shows that a witness violated this rule, then admission of that witness's testimony is within the trial court's discretion. Reversal on appeal is proper only where defendant shows an abuse of discretion by the trial court and resulting prejudice to defendant. State v. Perkins, 141 Ariz. 278, 294, 686 P.2d 1248, 1264 (1984). In Perkins, the court found a violation of rule 9.3. 141 Ariz. at 294, 686 P.2d at 1264. In that case, the prosecutor discussed the case jointly with two witnesses, but the court found that the trial court had not abused its discretion by allowing the witnesses to testify and that the defendant had not been prejudiced. Perkins, 141 Ariz. at 294–95, 686 P.2d at 1264–65.

(State v. Gulbrandson, 184 Ariz. 46, 63-64, 906 P.2d 579, 596 - 597 (Ariz.,1995).

The Rule has no bearing 5 weeks *before* trial. A multitude of events can arise which would prevent a trial.

The real motivation behind the state's Motion is to prevent these communications:

1) To prevent the Defendant and his daughters from talking.

2) To prevent the Defendant and his brother Jim (a named witness) from talking.

3) To prevent the Defendant, his parents and other siblings from talking. Those other siblings and parents conceivably could also be named as witnesses.

4) To prevent the DeMocker family members who have been "noticed" as witnesses from talking to each other -- ***or to drive a wedge between them***. The state's hoped-for collateral effect of this is that the DeMocker family will stop communicating with each other.

5) To prevent the prior Defense Team -- specifically "witness" John Sears -- from talking, except at a the state's requested Deposition.

Interestingly, the state did not raise The Rule during the interview process of several key witnesses (*infra*). In its Rule 9.3 Motion, the state noticed Det. Doug Brown as its investigator, which exempted Brown from the Rule 9.3 exclusion. However, here is a partial list of who was present during the following key interviews done with the state present:

1)	Charlotte DeMocker:	Det. Brown *and* the state's Investigator Mike Sechez.
2)	Katie DeMocker:	Det. Brown *and* the state's Investigator Mike Sechez.
3)	Renee Girard:	Det. Brown *and* the state's Investigator Mike Sechez.
4)	Barb O'Non:	Det. Brown *and* the state's Investigator Mike Sechez.
5)	Det. Brown:	The state's Investigator Mike Sechez.

6) Mike Sechez: Det. Brown.

During these interviews, Ms. Girard admitted that she had talked with Ms. O'Non. Det. Brown *and* the state's Investigator Mike Sechez have worked virtually as a team on this case and talk about the case constantly. Sechez does not fall under the "investigator" exclusion in Rule 9.3. Sechez was listed as a witness in the old case, and no correction to that status came until well *after* the above-listed interviews had been concluded. The state's "new" witness list, issued on July 29, 2011, has omitted Sechez as a "listed witness." Does the state think that the exclusion of Sechez from its "new" witness list grants him carte blanche to talk with everyone? It strains credulity that the state will not seek to use Sechez on rebuttal. Finally, Sechez will be on the Defense's list.

In the over three years that have passed since the death of Carol Kennedy, a reasonably prudent person could safely assume that there has been almost non-stop talking about this case -- by everyone. Except the attorneys to the press -- because of a "gag" order. At some point, one would have to assume that everything that could have been said has been said -- repeatedly.

Recently, the state communicated with the Defendant's brother, Jim DeMocker, without first contacting the Defense. Jim DeMocker is a listed witness, and the state has a right to talk with him if he is willing, because, neither the state nor the defense "owns" a witness.

> A witness, however, is not the exclusive property of either the prosecution or the defendant. U.S. v. Matlock, 491 F.2d 504 (6th Cir. 1974); U.S. v. Scott, 518 F.2d 261 (6th Cir. 1975).

(Mota v. Buchanan, 26 Ariz.App. 246, 249, 547 P.2d 517, 520 (Ariz.App. 1976).

But, the state cannot interfere with a witness who wants to assist a defendant. Jim DeMocker should be able to communicate with the Defense without being intimidated.

> Although a witness may refuse to be interviewed by defense counsel, the prosecution has no right to interfere with or prevent a defendant's access to a witness, absent any overriding interest in security. (Citations omitted). We approve the following statement by the Pennsylvania Supreme Court in Lewis, supra:
>
> 'We are of the view that, In the absence of an affirmative and convincing showing of exceptional circumstances or compelling reasons, a district attorney may not interfere with the pre-trial interrogation by a defense counsel or persons who may be called upon as witnesses in the case. Specifically, after a witness has stated that he is willing to talk with counsel for the defendant unless the district attorney objects, the district attorney may not, as we already indicated, relate his lack of consent to the witness. The district attorney may not interfere with or impose his preference or judgment on the defendant. In a case such as that at bar, the district attorney has no legitimate interest in preventing the witness from aiding the defendant. A public prosecutor is entrusted with an awesome duty which requires him to serve the interest of justice in every case. For this reason, a witness who may have information which is favorable to the defense must be made available to the defense. (citations omitted). Unquestionably, we cannot force a district attorney to approve of such questioning; however, we may certainly bar him from communicating his disapproval to the witness. We are not hereby saying that witnesses themselves may be compelled to speak with defense counsel prior to trial. We merely intend to prevent the prosecuting attorney from interfering with this aspect of the defendant's preparation for trial.

(*Id.*).

An unnecessary and premature invocation of The Rule may have a "chilling effect" on witnesses willingness to communicate with the Defense.

More importantly, the state is needlessly holding the Defendant is solitary confinement -- *for 10 months now* -- do they also really need to cut him off from his family members or friends who happen to be listed as witnesses? At what point does the state's treatment of the Defendant become a psychological detriment to a fair trial?

The state has a mountain of jail recordings between the Defendant and other people, some of whom now happen to be listed as witnesses. There has been a veritable squadron of people from the state monitoring those conversations. Any alleged "evidence" the state thinks is admissible at trial concerning what the Defendant has said in those jail recording, will be

submitted by the state to the Court for consideration as to admissibility.

There is no reason to intimidate witnesses through the premature invocation of The Rule, which would needlessly isolate the Defendant even more.

Finally, this Court does not have jurisdiction to order out-of-state witnesses not to talk with each other.

For the above stated reasons, the Defendant objects to the state's "Motion Pursuant to Rule 9.3." Should the Court be inclined to grant the 9.3 Motion, the Defendant requests that the Court make specific findings as to why.

RESPECTFULLY SUBMITTED this August 4, 2011.

Craig Williams
Attorney at Law

A copy of the foregoing delivered to:
Hon. Warren Darrow, Division PTB, Hon. David Mackey, Yavapai County Presiding Judge
Jeff Paupore, Steve Young, Yavapai County Attorney's Office
The Defendant
Greg Parzych, via e-mailed .pdf
by: _____